United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 16, 1996

TO : Gerald Kobell, Regional Director
Region 6 530-6067-4011-4400
530-6067-4011-6600

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Duquesne Light Company
Case 6-CA-27904

This Section 8(a)(5) case was submitted for advice as to whether the Employer's decision to automate its meter reading system was a mandatory subject of bargaining.[1]

FACTS

Duquesne Light Company (the Employer) is an electric utility company serving the Greater Pittsburgh area. Its employees have been represented by six IBEW locals (collectively, the Union) for approximately 40 years. The parties' current collective-bargaining agreement is effective from October 1, 1994 through September 30, 1998.[2]

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[1] The Union's charge does not allege that the failure to bargain over this decision was unlawful; rather, the Union challenged only the unilateral subcontracting of the installation and maintenance of the new system. However, the Region has sua sponte considered whether the automation decision itself was a mandatory subject of bargaining.

The Region has also submitted this case to Advice as to the warrant for Section 10(j) injunctive relief with regard to the Employer's failure to bargain over the decision to have the supplier of the system install, operate and maintain it, where such work could have been performed by unit employees. That issue will be addressed in a separate memorandum.

[2] Nothing in the agreement expressly permits or prohibits the Employer's automation of its meter reading system, as described herein.

Until recently, the Employer used a manual meter reading system whereby unit employee meter readers would visit every home and business and record electricity usage. In January 1996, without notifying or bargaining with the Union, the Employer entered into a 15-year, $155 million contract with an independent company, Itron Corporation, for the installation, operation and maintenance of an automated meter reading (AMR) system. This system electronically transmits usage data to the Employer's mainframe computers, and completely eliminates the need for manual meter reading.

The Employer has asserted that it decided to automate its meter reading function for two reasons: (1) to increase reliability in the monitoring of real time usage and in the reporting and management of power outages (which the Pennsylvania Utility Commission had urged it to improve); and (2) to enable it to provide new customer services -- including "real" time charging, no home visits and customer selection of on/off dates and billing dates -- which it projects will enable it to better compete with lower priced electricity suppliers. There is contemporaneous documentation which supports the Employer's assertion that these were its goals.[3]

The Union estimates that approximately 100 meter readers will ultimately lose their jobs as a result of the Employer's decision to automate the meter reading function. The Union also estimates that between 50 and 100 meter installers, repair shop employees, technicians and other field service employees will lose their jobs as a result of the Employer's further decision to subcontract out the installation, operation and maintenance of the AMR system to Itron.

ACTION

We conclude, in agreement with the Region, that the Employer did not violate Section 8(a)(5) by failing and

[3] The Employer has also estimated that over the life of the contract with Itron Corporation the Employer will save about $80 million in unit labor costs as a result of the automation of the meter reading function.

refusing to bargain over its decision to automate its meter reading function, which includes the resulting elimination of the meter reader job classification, because that decision did not involve a mandatory subject of bargaining within the meaning of Section 8(d) of the Act.[4]

Under the Board's Dubuque Packing decision, in order to make a prima facie showing that a work relocation decision is a mandatory subject of bargaining, the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation."[5] The Employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses.[6] Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision.[7] The Employer also may avoid bargaining if it demonstrates that (1) labor costs were not a factor in the decision or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.[8] Although Dubuque Packing specifically concerned

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[4] The Employer has expressed a willingness to engage in "effects" bargaining, which should include negotiation over the extent and methodology of layoffs. See Litton Business Systems, 286 NLRB 817, 819-20 (1987), enfd. in rel. part 893 F.2d 1128, 1133-34, 133 LRRM 2354 (9th Cir. 1990), revd. on another issue, 501 U.S. 190, 137 LRRM 2441 (1991).

[5] Dubuque Packing Co., 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24, 31-33, 143 LRRM 3002 (D.C. Cir. 1993), pet. for cert. dismissed 146 LRRM 2896 (1994). See also "Guideline Memorandum Concerning Dubuque Packing Co., Inc., 303 NLRB No. 66," Memorandum GC 91-9, dated August 9, 1991 at p. 4 (hereinafter GC Guideline).

[6] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-5.

[7] See Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360, 148 LRRM 2705 (4th Cir. 1995), affd. ___U.S. ___, 152 LRRM 2001 (1996).

[8] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-6.

work relocation decisions, its principles are applicable to "Category III" decisions, including a decision to automate, as described in First National Maintenance.[9]

In determining whether an employer decision involved a basic change in the fundamental scope or direction of the enterprise, it is appropriate to consider pre-Dubuque decisions under Otis Elevator,[10] which also examined whether there had been a fundamental change in the scope or direction of the enterprise.[11] In several cases decided under Otis, the Board found no obligation to bargain where, e.g., the employer's decision to consolidate operations and subcontract work turned on the need to eliminate duplication and to respond to the deteriorating quality of its product caused by obsolete equipment;[12] the employer's decision to subcontract work turned on the employer's inability to compete because of an "outmoded" operation;[13] and the employer's decision to subcontract all of its machine shop work was motivated by declining business and the substantial amount of capital necessary to modernize the machine shop.[14] In Litton Business Systems,[15] the Board held that the employer unlawfully failed to bargain over its decision to lay off employees who had operated cold-type presses the employer had unilaterally ceased

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[9] First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677, 686 n. 22, 107 LRRM 2705, 2709 (1981). A Category III decision is a decision that has a direct impact on employees, but has as its focus the economic profitability of an Employer's business. Id., 452 U.S. at 677.

[10] 269 NLRB 891, 893 (1984).

[11] See GC Guideline at p. 5.

[12] Bostrom Division, UOP, Inc., 272 NLRB 999 (1984).

[13] Kroger Co., Inc., 273 NLRB 462 (1984).

[14] Fraser Shipyard, 272 NLRB 496 (1984).

[15] 286 NLRB at 819-820.

operating. However, the Board in Litton Business Systems did not disturb the ALJ's finding (286 NLRB at 831) that the employer's decision to convert from cold-type presses to hot-type presses was a non-mandatory subject of bargaining, because it involved a basic change in the direction of the business.

Since Dubuque, the Board has continued to find that basic entrepreneurial changes in the way an employer operates, or provides services to its customers, are changes in the "scope or direction of the enterprise" and therefore not mandatory subjects of bargaining. For example, in Noblit Brothers, Inc.,[16] the Board held that there was no duty to bargain over the employer's decision to change its basic sales method, and therefore to change the "manner in which it related to its customers," despite the consequent elimination of unit personnel. In Holly Farms Corp.,[17] the Board similarly held that there was no duty to bargain over the employer's decision to integrate the transportation divisions of a newly purchased company and the purchaser's own system, because the decision involved structural and operational changes to improve efficiency and profitability.

In applying these standards to this case, we conclude that the General Counsel would be unable to meet his initial burden of establishing that the Employer's decision to automate its meter reading function did not constitute a basic change in the nature of the Employer's operation. Although the Employer is still in the business of supplying electricity, the automation of the meter reading function involved a major commitment of Employer capital,[18] and will alter many aspects of the Employer's operation, including load management, rate determination, outage response and

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[16] 305 NLRB at 330.

[17] 311 NLRB at 277-278.

[18] See Holly Farms Corp., 311 NLRB at 278; Litton Business Systems, 286 NLRB at 832. Compare Bob's Big Boy Family Restaurants, 264 NLRB 1369, 371 (1982)(subcontracting which involved no capital restructuring or investment was a mandatory subject of bargaining).

the provision of expanded services to customers. Such changes constitute a fundamental shift in the nature of the business of supplying electricity in the new competitive environment of the 1990s, where customers can now choose among several competing power companies.

Moreover, even assuming that the automation decision did not involve a basic change in the nature of the Employer's enterprise, the Employer can establish that the automation was motivated primarily by the Employer's dual needs to improve its outage management and to compete more effectively with suppliers of low cost electricity by offering new customer services. These concerns caused the Employer to automate even though the new system required a capital investment of about double the labor costs the Employer predicts it will save through automation.[19] Under these circumstances, the Employer effectively has demonstrated that the Union had no control over the factors motivating the Employer's decision and that the issue was not amenable to resolution through the collective-bargaining process.[20]

Accordingly, the Employer's unilateral implementation of an automated meter reading system was a fundamental managerial decision which was at the core of entrepreneurial control and was therefore not a mandatory subject of collective bargaining under the Act.[21] Thus, this aspect of the instant charge should be dismissed, absent withdrawal.

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[19] The Employer asserts that the total bargaining unit labor cost savings from automation of the meter reading function will be approximately $80 million over the term of the 15-year contract with Itron Corporation. The Region has no basis upon which to challenge this assertion. The cost of the automation is approximately $155 million.

[20] See Dubuque, 303 NLRB at 391.

[21] See generally First National Maintenance Corp. v. NLRB, 452 U.S. at 677 and 684-86; Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223, 57 LRRM 2609 (1964)(Justice Stewart, concurring).

B.J.K.